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In the

Supreme Court of the United States

OCTOBER TERM, A.D., 1970

BARBARA MITCHELL, et al.,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Petitioners, BARBARA MITCHELL and ALBERT WYATT, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois.

JUDGMENT AND OPINIONS OF THE COURT BELOW

The judgment of the Circuit Court of Cook County, County Department, Criminal Division, was entered for Barbara Mitchell on January 3rd, 1967 and for Albert Wyatt on April 28th, 1967, and are not reported.

The original opinion of the Supreme Court of Illinois, affirming said judgments, was filed on March 24th, 1970, and is set forth in Appendix B. This opinion was pur-

suant to a granting of the People's Petition for Rehearing.

The opinion was unreported and is set forth in Appendix B.

JURISDICTION

The opinion of the Supreme Court of Illinois was entered on March 24th, 1970. This Petition for a Writ of Certiorari filed within 90 days after the day on which the Supreme Court filed its opinion after having granted a petition for rehearing.

The jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1257 (3).

QUESTION PRESENTED

Whether a search warrant issued on an affidavit judicially determined to be fraudulent satisfies the probable cause requirement of the 4th Amendment, and is a defendant aggrieved by such an affidavit entitled to a hearing on this issue?

CONSTITUTIONAL PROVISION INVOLVED

The Fourth and Fourteenth Amendments to the Constitution of the United States.

STATEMENT OF THE CASE

This petition encompasses three separate indictments involving searches made with warrants. These warrants were supported by identical affidavits, where only the address of the premises and the phones located thereon were different.

These affidavits in substance stated that the affiant, a police officer assigned to the gambling unit, received

information from a "reliable informant", that he (the informer) had a telephone number that he had used to place bets on prior occasions. The affiant then dialed the number and gave the phone to the informant, whereupon he heard the informant allegedly place a bet for a certain amount on a horse or horses at various race tracks, the informant would then say "that is all" and hang up. In each instance the informant told the affiant that the phone was answered by an unknown person who accepted the bets.

In each indictment the defendants made a motion to quash the search warrant on the basis that the affidavit was fraudulent, and even if true, lacked probable cause, and a hearing was held.

The evidence in each indictment adduced that the defendants were on the premises at the time the informer made the alleged phone call, but no such call or bet was received.

The evidence further revealed in each instance the officers executed the search warrants within two hours after the phone calls were made, but never recovered the alleged bets made by the informers, although they recovered bets made on races both before and after the bets allegedly placed by the informers.

The evidence further revealed that when a bet is made over the phone it is a credit type arrangement and the parties must know each other in order to transact business, but in none of these cases did the officers attempt to obtain this information from the informers.

The evidence further revealed that these officers were all members of the same unit and that they had obtained over one hundred warrants of this type and in not one

was the informer ever able to furnish the officers with anything but the telephone number.

The motions were overruled, the defendants found guilty and their cases were consolidated on appeal in the Supreme Court of the State of Illinois.

In a divided opinion, dated the 28th day of May, 1969, (App. A) the Illinois Supreme Court ruled that the defendants were entitled to a hearing on the issue of fraud and that the defendants had sustained their burden of proof and the decisions of the lower court were reversed.

On a later date the composition of the court changed, a petition for rehearing, filed by the Attorney General of the State of Illinois, was granted, and the Supreme Court of the State of Illinois affirmed the convictions of the defendants, ruling that the defendants were not entitled to a hearing on the issue of fraud and perjury, and the affidavits stated probable cause.

Whereupon the defendants prosecuted this petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

THERE IS A GRAVE CONFLICT IN VARIOUS JURISDICTIONS, BOTH STATE AND FEDERAL, AS TO WHETHER AN AFFIDAVIT MAY BE ATTACKED COLLATERALLY UPON THE BASIS OF FRAUD.

The Supreme Court in *Rugendorf* v. *United States*, 376 U.S. 528, 11 L.Ed 2d 887, 84 S.Ct. 825, stated that it had never passed directly on the extent to which a court may permit such an examination. However, it did not dispute, or at least it left open, the question of under what circumstances the right might be exercised, stating that the facts then before it were "of only peripheral relevance to the showing of probable cause, and * * * did not go to the integrity of the affidavit."

Jones v. *United States*, 362 U.S. 257, 80 Sup.Ct., 725 assumes that you can go behind the affidavit if there was an allegation of fraud. Further this opinion held that it would be proper to ask for the production of the informer in the event that there was a claim of fraud. In its opinion the Court stated at page 271 as follows:

> "Petitioner argues that the warrant was defective because the Didone's informants were not produced, because his affidavit did not even state their names and the Didone's did not undertake and swear to the results of his own independent investigation of the claims made by his informants. *If the objections raised were that the Didone has misrepresented to the commissioner his basis for seeking a warrant these matters might be relevant.*" (Emphasis added)

In *United States* v. *Gillette* (2d cir.), 383 F. 2d 843, the court stated that "in appropriate circumstances, a hearing should be held to establish the veracity of sworn allegations in an affidavit which is adequate on its face." To like effect is *United States* v. *Suarez* (2d cir.), 380

F.2d 713, wherein the court stated that it may be that testimony at trial could so clearly demolish statements in an affidavit supporting the warrant, that a prior denial of a motion to suppress would be overridden. In *Gillette*, it was held that the issue had not been properly raised by defendant's attorney and there was no factual issue to be resolved. In *Suarez* defendant failed to request a hearing and even so the court found that evidence was properly heard though it fell far short of controverting statements in the affidavit. In *Chin Kay* v. *United States* (4th cir.), 311 F.2d 398, it was acknowledged that under proper circumstances a defendant may be able to challenge the veracity of recitals of "previous reliability" by a motion to suppress. In *King* v. *United States* (4th cir.), 282 F.2d 398, the court stated that at least in Federal Courts the rule is that false information given by the affiant will vitiate the warrant and search. See also *People Ex Rel Pugh* (7th cir.), 401 F.2d ..... In *United States* v. *Pearce* (7th cir.), 275 F.2d 318 the lower heard extensive evidence on the question whether affiant had personal knowledge of the matters alleged in the affidavit, and on appeal it was held that the propriety of such a hearing was hardly open to question. In *United States* v. *Roth* (7th cir. 1967), 391 F.2d 507, 509, the court held that a trial court may not use evidence adduced at a subsequent hearing on a motion to suppress to validate an otherwise defective affidavit. "But if the hearing discloses matters which discredit or impeach the assertions in the affidavit, these must be considered by the trial court in determining whether probable cause in fact existed."

In *People* v. *Alfinito*, 16 N.Y.2d 181; 211 N.E.2d 644, in a case involving the placing of wagers, the Court recognized the right of the defendant to question the veracity of the affiant, stating that:

> "Modern thought which produced the decision in Mapp v. Ohio, 367 U.S. 643, 6 L.Ed 2nd 1081, 81 S.Ct. 1684, would make incongruous any holding that a search warrant is beyond attack even on proof that the allegations on which it was based were perjured."

The Supreme Court of Illinois held that these defendants were barred from raising the question of fraud once the warrant had been issued by the magistrate to which opinion Mr. Justice Schaefer (Appendix B) wrote a vigorous and forceful dissent.

The Supreme Court of Illinois relied upon *People* v. *Bak* (unreported Appendix C) and held that this opinion foreclosed the defendants.

In *People* v. *Bak*, Ibid, a unique opinion filed the same day in which Mr. Justice Ward wrote the opinion and dissented thereto, the court held that Illinois would join the jurisdictions which hold that matters alleged under oath, upon which a search warrant was issued, may not be disputed by one against whom, or against whose property the warrant has been directed. See, *Kenney* v. *United States*, (D.C. Cir.), 157 F.2d 442; *United States* v. *Gianaris*, (D.D.C.), 25 F.R.D. 194; *Tucker* v. *State*, 244 Md. 488, 224 A.2d 111; *Mattingly* v. *Commonwealth*, 340 Ky. 561, 221 S.W.2d 82; *Owens* v. *State*, 217 Tenn. 544, 399 S.W.2d 507; *Hernandez* v. *State*, 158 Tex. Crim. 296; 255 S.W.2d 219; *Griffey* v. *State*, 168 Tex.Crim. 338, 327 S.W.2d 585.

The Appellate Court of Illinois, in reliance upon the command of *People* v. *Bak* (Ibid) has ruled in *People* v. *Healy*, et al (unreported Appendix D) that even though the trial Judge makes a specific finding of fraud and perjury in the allegations of an affidavit, it may not be attacked.

These conflicts justify the granting of Certiorari to review the judgments below.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Illinois.

Respectfully submitted.

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APPENDIX "A"

Docket Nos. 41463, 41464, cons.—Agenda 8—March, 1969.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, *vs.* BARBARA MITCHELL, *et al.*, Appellants.

MR. JUSTICE SCHAEFER delivered the opinion of the court:

Separate appeals by the defendants, Barbara Mitchell and Albert A. Wyatt, from judgments of conviction entered in the circuit court of Cook County have been consolidated. Each defendant was indicted for the offense of knowingly owning or possessing instruments and apparatus by means of which bets and wagers were made, recorded, and registered, in violation of section 28—1 (a) (5) of the Criminal Code. (Ill. Rev. Stat. 1965, ch. 38, par. 28—1(a)(5).) While the convictions were based upon separate occurrences, the facts in the two cases are similar and the legal issues presented are identical.

In each case incriminating evidence was seized by police officers acting under search warrants that had been issued on affidavits which, in the respects here involved, were substantially identical. In each case the defendant moved to suppress the evidence that had been seized, on the ground that there was not probable cause for the issuance of the warrant. Evidence was received, and the motion was denied. Each case was then submitted on a stipulation that the evidence heard upon the motion to suppress would be the evidence upon the trial, and each defendant was found guilty.

The State has contended that upon a motion to suppress the defendant may not "go beyond the four corners of the warrant for the purpose of controverting the matters contained in the affidavit." Apart from constitutional considerations, however, this contention is rebutted by the explicit language of the statute, which authorizes

such a motion upon the ground that "there was not probable cause for the issuance of the warrant" and provides that "The judge shall receive evidence on any issue of fact necessary to determine the motion and the burden of proving that the search and seizure were unlawful shall be on the defendant." (Ill. Rev. Stat. 1967, ch. 38, par. 114—12; see also *People* v. *Bak*, Nos. 41151, 41315 cons., —— Ill.2d ——; *People* v. *Clifton*, No. 41608, —— Ill.2d ——.) The question for decision, therefore, is whether the defendants have met their statutory burden.

In each of these cases the search warrant was issued upon the affidavit of a police officer who stated that he had received information from a reliable informer whose previous disclosures had led to a number of arrests or convictions; that the informer had identified a telephone number which he said he called to place bets, and that the telephone company had supplied the name and address of the subscriber of the designated number, which address was set out in the affidavit. Each affidavit then stated that the affiant dialed the number, handed the telephone to the informer, and that the affiant heard the informer place one or more bets on named horses in specified races. Each affidavit stated that the informer said that when he was handed the telephone it was answered by a person *unknown to him, with whom he placed* his bets. The affidavits stated that the informer said that after the bets were placed, their unknown recipient inquired whether that was all, and the affiant stated that he heard the informer say, "I may call you later," or "That's all for now," or make some similar response.

The defendant Mitchell testified that she had not received a telephone call in which a $5 bet was placed on Latin Liner to win in the first race at Hawthorne, as specified in the affidavit; that she had not been previously arrested and had not ever accepted a bet on a horse. She also testified that a bookmaker with whom she had placed bets was in her apartment when the police entered and that he attempted to leave by the back door of her apartment as the officers were entering the

front door. An officer testified that the only other person present in her apartment was an old man who was not arrested. The officer whose affidavit had led to the search of her apartment testified that the informer did not give him the name of the person who answered the phone, although the officer had asked for this information. The officer did not ask nor was he told where the informer had paid or collected previous bets placed through Mitchell's number. In the search of Mitchell's apartment, records were seized which recorded bets on races before and after the race on which the informer said that he had placed his bet, but no record of that bet was found.

The defendant Wyatt was indicted on two separate counts which arose out of the seizure of evidence on two occasions. One search occurred at 6752 East End Avenue on September 26, 1966, and the other at 740 West 58th Street on September 8, 1966. Wyatt testified that on neither date had he received the bet described in the affidavits. The officer upon whose affidavit the warrant for the search of the East End Avenue apartment was issued testified that the informer did not disclose the name of the person who received the bet. He testified that the informer said that he paid and collected his bets at a tavern, but the officer had not made a record of the location of the tavern and could not remember it. The gambling records seized at the East End Avenue address did not include the bet alleged to have been placed by the informer.

The officer who prepared the affidavit on which the warrant for the search of the West 58th Street apartment was issued testified that the same informer was used and that he was not able to identify the person with whom he spoke when he placed the bet described in the affidavit. In this case, as in the others, there was no record of such a bet among the records seized, nor did the informer identify the place at which he paid his bets and collected his winnings.

Attached to the motions to suppress in these cases were approximately thirty affidavits which had been used to secure warrants in previous cases. All were similar in form to those here involved. The three officers upon whose affidavits the warrants involved here were issued testified that they had prepared approximately 100 affidavits which contained statements similar to those used here. In none of them was the recipient of the telephone bet identified. The officers testified that identical procedures were used in all cases in telephoning the bet to the suspected number; the officer dialed the number and handed the phone to the informer.

The affidavits upon which the warrants in these cases were issued are based almost entirely on hearsay; in each case the affiant's participation is limited to dialing the suspected number and listening to the informer's portion of an alleged conversation. Following the decision of the Supreme Court of the United States in *Jones* v. *United States* (1960), 362 U.S. 257, at 272, 4 L. Ed. 2d 697, 708, 80 S. Ct. 725, we stated in *People* v. *Jackson*, 22 Ill.2d 382, 387, that "hearsay may be used to establish probable cause for a warrant, so long as there is a substantial basis for crediting the hearsay." We have adhered to that statement in subsequent cases. *People* v. *York*, 29 Ill.2d 68, 70; *People* v. *Williams*, 27 Ill.2d 542; see also *United States* v. *Ventresca*, 380 U.S. 102, at 108, 13 L. Ed. 2d 684, 85 S. Ct. 741.

In the cases before us, several circumstances combine to discount substantially the credibility of the statements of the undisclosed informer. In each case, the informer was unable to identify the person with whom he spoke over the telephone, even though he had placed the bet on credit and had used the number for prior betting transactions. The incongruous nature of this circumstance is underscored by the lack of official interest in other aspects of the gambling operations of the defendants, such as the location of outlets for collection and payment, and the identity of those who collected and paid. Moreover, if we accept the fact that a particular number was

dialed and that the affiant heard the informer speak into the instrument, that fact does not establish either that the telephone was answered or that the person who answered it accepted a bet. Although the inference that the call was completed and the proffered bet accepted normally would require slight corroboration, in these cases there is none. To the contrary, the searches took place shortly after the telephone conversations and the fact that no records of the bets alleged to have been made were found, when records of other bets appeared to have been regularly kept, necessarily raises substantial doubts. At crucial stages in the development of the case for probable cause, that which would normally be assumed to follow—the informer's knowledge of the identity of the person with whom he had placed the bet; and a record of the bet supposedly placed—is affirmatively shown to be absent. When the hearsay information supplied by the informer is appropriately discounted, what remains falls short of probable cause and the motions to suppress should have been granted.

The judgments of the circuit court of Cook County are reversed.

Judgments reversed.

MR. JUSTICE HOUSE, dissenting:

The trial court in this case has been reversed because the majority feel that there was not a substantial basis for crediting the hearsay upon which "probable cause" for issuance of the warrant was based. While rejecting the contention of the People that the averments of the affidavit may not be controverted, the result reached by the majority with the exception of one deficiency (to credit the hearsay) could have been reached by an examination of the face of the affidavit. If the deficiencies found by the majority in the case are necessary to credit the hearsay establishing probable cause, then they should be in the affidavit. The one deficiency which the majority says tends to discredit probable cause and which could not be put in the affidavit is the fact that the informer's

bet was not recorded. If this fact, which could only be established after the search, is permitted to discredit the hearsay, it would seem that the fact that gambling equipment was found should be allowed to credit the hearsay.

Unlike *People* v. *Bak*, *Nos.* 41151 and 41315, the majority this time relies solely on its interpretation of section 114—12 of the Code of Criminal Procedure (Ill. Rev. Stat. 1967, ch. 38, par. 114—12) to allow a defendant to controvert the averments of the affidavit. "Apart from constitutional considerations, however, this contention is rebutted by the explicit language of the statute, which authorizes such a motion upon the ground that 'there was not probable cause for the issuance of the warrant' and provides that 'The judge shall receive evidence on any issue of fact necessary to determine the motion and the burden of proving that the search and seizure were unlawful shall be on the defendant.'"

To say that the statute is "explicit" is a bootstrap argument because it assumes the very issue to be decided by this court. The People argue that on a motion to suppress the defendant may not "go beyond the four corners of the warrant for the purpose of controverting the matters contained in the affidavit." If this be true, then whether there was "probable cause" is a question of law and it is not necessary for the judge to receive evidence "on any issue of fact." If, however, the averments of the affidavit may be controverted, then whether there was "probable cause" is a question of fact and the judge may receive evidence on that question of fact in order "to determine the motion".

As pointed out in the dissenting opinion in *Bak*, the intent of the legislature in enacting section 114—12 was to provide the pretrial procedure for enforcing the constitutional right against unreasonable search and seizure. Thus, the statutory right under section 114—12 is coextensive with the constitutional right and it does not enlarge it. As further pointed out in the dissenting opinion to *Bak*, no case has held that a defendant has a constitutional right to controvert the averments of an affi-

davit; and if such a right were to be applied by the Federal courts, it would be limited to an inquiry of whether the affiant intentionally misled the magistrate. Here the majority reverses the trial court and holds that the incriminating evidence be suppressed, not because of any perjury by the affiant, but simply because it does not believe the hearsay statements of the undisclosed informer.

There seems to be little doubt that this ruling will create a situation where every search warrant which proves fruitful will be attacked on the ground that every statement in the affidavit is wrong except those concerning the incriminating evidence found, because it is a simple matter to find witnesses who will later swear to the opposite of what the affiant swore or the informer said. I feel that the trial court should have been affirmed.

MR. JUSTICE UNDERWOOD, also dissenting:

For the reasons stated by MR. JUSTICE HOUSE and me in *People* v. *Bak*, Nos. 41151, 41513 cons., and by him in this case, I join in his dissent.

MR. JUSTICE WARD took no part in the consideration or decision of this case.

APPENDIX "B"

Docket Nos. 41463, 41464, cons.—Agenda 69—November, 1969.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, *vs.* BARBARA MITCHELL *et al.*, Appellants.

MR. JUSTICE KLUCZYNSKI delivered the opinion of the court:

Separate appeals by the defendants, Barbara Mitchell and Albert A. Wyatt, from judgments of conviction entered in the circuit court of Cook County have been consolidated. Each defendant was indicted for the offense of knowingly owning or possessing instruments and apparatus by means of which bets and wagers were made, recorded, and registered, in violation of section 28—1(a)(5) of the Criminal Code. (Ill. Rev. Stat. 1965, ch. 38, par. 28—1(a)(5).) While the convictions were based upon separate occurrences, the facts in the two cases are similar and the legal issues presented are identical.

In each case incriminating evidence was seized by police officers acting under search warrants that had been issued on affidavits which, in the respects here involved, were substantially identical. In each case the defendant moved to suppress the evidence that had been seized, on the ground that there was not probable cause for the issuance of the warrant. Evidence was received, and the motion was denied. Each case was then submitted on a stipulation that the evidence heard upon the motion to suppress would be the evidence upon the trial, and each defendant was found guilty.

In each of these cases the search warrant was issued upon the affidavit of a police officer who stated that he had received information from a reliable informer whose previous disclosures had led to a number of arrests or convictions; that the informer had identified a telephone number which he said he called to place bets, and that the

telephone company had supplied the name and address of the subscriber of the designated number, which address was set out in the affidavit. Each affidavit then stated that the affiant dialed the number, handed the telephone to the informer, and that the affiant heard the informer place one or more bets on named horses in specified races. Each affidavit stated that the informer said that when he was handed the telephone it was answered by a person unknown to him, with whom he placed his bets. The affidavits stated that the informer said that after the bets were placed, their unknown recipient inquired whether that was all, and the affiant stated that he heard the informer say, "I may call you later," or "That's all for now," or make some similar response.

The defendant Mitchell testified that she had not received a telephone call in which a $5 bet was placed on Latin Liner to win in the first race at Hawthorne, as specified in the affidavit; that she had not been previously arrested and had not ever accepted a bet on a horse. She also testified that a bookmaker with whom she had placed bets was in her apartment when the police entered and that he attempted to leave by the back door of her apartment as the officers were entering the front door. An officer testified that the only other person present in her apartment was an old man who was not arrested. The officer whose affidavit had led to the search of her apartment testified that the informer did not give him the name of the person who answered the phone, although the officer had asked for this information. The officer did not ask nor was he told where the informer had paid or collected previous bets placed through Mitchell's number. In the search of Mitchell's apartment, records were seized which recorded bets on races before and after the race on which the informer said that he had placed his bet, but no record of that bet was found.

The defendant Wyatt was indicted on two separate counts which arose out of the seizure of evidence on two occasions. One search occurred at 6752 East End Avenue

on September 26, 1966, and the other at 740 West 58th Street on September 8, 1966. Wyatt testified that on neither date had he received the bet described in the affidavits. The officer upon whose affidavit the warrant for the search of the East End Avenue apartment was issued testified that the informer did not disclose the name of the person who received the bet. He testified that the informer said that he paid and collected his bets at a tavern, but the officer had not made a record of the location of the tavern and could not remember it. The gambling records seized at the East End Avenue address did not include the bets alleged to have been placed by the informer.

The officer who prepared the affidavit on which the warrant for the search of the West 58th Street apartment was issued testified that the informer was used and that he (the informer) was not able to identify the person with whom he spoke when he placed the bet described in the affidavit. In this case, as in the others, there was no record of such a bet among the records seized, nor did the informer identify the place at which he paid his bets and collected his winnings.

Attached to the motions to suppress in these cases were approximately 30 affidavits which had been used to secure warrants in previous cases. All were similar in form to those here involved. The three officers upon whose affidavits the warrants involved here were issued testified that they had prepared approximately 100 affidavits which contained statements similar to those used here. In none of them was the recipient of the telephone bet identified. The officers testified that identical procedures were used in all cases in telephoning the bet to the suspected number; the officer dialed the number and handed the phone to the informer.

Defendants contend that they have the right to controvert the matters declared under oath which occasioned the finding of probable cause and the issuance of a search warrant by a judicial officer in each of their respective

cases. We have today, in *People* v. *Bak*, Nos. 41151, 41315 cons. held that no such right obtains, either under the fourth amendment to the United States constitution, section 6 of article II of the Illinois constitution, or under our Code of Criminal Procedure (see Ill. Rev. Stat. 1967, ch. 38, par. 114—12), and we here expressly adopt the reasoning of that opinion in disposing of this issue.

Defendants next contend that the affidavits used to obtain the search warrants in each case failed to show probable cause and, therefore, the search warrants should have been quashed. The affidavits upon which the warrants in these cases were issued are based almost entirely on hearsay; in each case the affiant's participation is limited to dialing the suspected number and listening to the informer's portion of an alleged conversation. Following the decision of the Supreme Court of the United States in *Jones* v. *United States* (1960), 362 U.S. 257, at 272, 4 L. Ed. 2d 697, 708, 80 S. Ct. 725, we stated in *People* v. *Jackson*, 22 Ill.2d 382, 387, that "hearsay may be used to establish probable cause for a warrant, so long as there is a substantial basis for crediting the hearsay." We have adhered to that statement in subsequent cases. *People* v. *York*, 29 Ill.2d 68, 70; *People* v. *Williams*, 27 Ill.2d 542; see also *United States* v. *Ventresca*, 380 U.S. 102, 13 L. Ed. 2d 684, 85 S. Ct. 741.

In *Aguilar* v. *Texas* (1964), 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509, the Supreme Court enunciated the criteria upon which search warrants issued on the basis of information supplied by undisclosed informants are to be judged. The court there held that "the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed [citation] was 'credible' or his information 'reliable'." (378 U.S. at 114.) Recently, in *Spinelli* v. *United States*, 1969, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584, the court reaffirmed this position stating: "The informer's report

must first be measured against *Aguilar's* standards so that its probative value can be assessed. If the tip is found inadequate under *Aguilar*, the other allegations which corroborate the information contained in the hearsay report should then be considered. At this stage as well, however, the standards enunciated in *Aguilar* must inform the magistrate's decision." 393 U.S. at 415.

In applying these standards to the warrants before us, we are mindful of the "established propositions" adhered to in *Spinelli*, that "probability, and not a *prima facie* showing, of criminal activity is the standard of probable cause, [citation]; that affidavits of probable cause are tested by much less vigorous standards than those governing the admissibility of evidence at trial, [citation]; that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, [citation]; and that their determination of probable cause should be paid great deference by reviewing courts, [citation]." (393 U.S. at 419.) Accordingly, after thorough review of the warrants in question, we find that they were properly issued on probable cause and subscribe to the standards enumerated in *Aguilar*. Here, the affiants specifically averred that they had received information from a "reliable informant" who had in the past supplied them with information which had proved true, exact and accurate and which resulted in enumerated arrests and convictions. Further, the affiants specifically related the "underlying circumstances" from which the informant concluded that illegal gambling operations were being conducted, *i.e.*, when the informer desired to make a wager on a horse race, he would call a specific telephone number. Too, to the extent that affiants overheard the conversation, albeit one-sided, what they heard (the informer placing the bet and "I may call you later" or "That's all for now") corroborated, to a limited extent, the informer's "tip". Accordingly, after giving due deference to the warrants in question (*United States v. Ventresca*, 380 U.S. 102, 109, 13 L. Ed. 2d 684, 689, 85 S. Ct. 741) and after thorough analysis of the "underly-

ing circumstances" (*Aguilar v. Texas*, 378 U.S. 108, 114; *Spinelli v. United States*, 393 U.S. 410) we conclude that the warrants here issued were based on probable cause.

Finally, defendant Mitchell argues that the State failed in its burden of proving her guilty beyond a reasonable doubt. "It is well established that we will not disturb the findings of the trier of fact and substitute our own conclusions unless the proof is so unsatisfactory as to justify a reasonable doubt as to defendant's guilt." (*People v. Williams*, 36 Ill.2d 505, 510.) We are unable to find any such deficiency in the record before us.

The judgments of the circuit court of Cook County are therefore affirmed.

Judgments affirmed.

MR. JUSTICE WARD took no part in the consideration or decision of this case.

MR. JUSTICE SCHAEFER, dissenting:

The fourth amendment to the constitution of the United States provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation." Section 6 of article II of the constitution of Illinois contains a similar prohibition. The basic question in these cases is whether those constitutional provisions can be interpreted to mean that the existence of the facts relied upon to establish probable cause cannot be controverted once the warrant has issued. If there can be no subsequent inquiry into the truth of those facts, the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," is protected only by an unreviewable *ex parte* determination of the lowest officer in the judicial hierarchy. And that determination may be based upon a hearsay report of the statements of an anonymous informer, which would be inadmissible in any judicial proceeding. I cannot bring myself to believe that this is the "probable cause, supported by Oath" required by the fourth amendment.

One of the difficulties in dealing with this area of the law is that most of the cases with which the courts are concerned involve illegal possession of gambling equipment or narcotics, and the result of the search makes guilt unmistakable. The courts have no way of knowing how many unproductive searches are made upon the basis of false affidavits because those cases do not come before the courts. The constitutional requirement of an oath would seem to imply a remedy, either by civil action or by perjury prosecution, for the victim of a search based upon a false affidavit, but the conclusion of the majority in *McCray* v. *Illinois* (1967), 386 U.S. 300, 18 L. Ed. 2d 62, 87 S. Ct. 1056, seems to have eliminated any remedy.

In an atmosphere in which there is widespread concern about narcotics problems it is difficult for a court to enforce constitutional guarantees at the instance of one who is unquestionably guilty. But the constitutional provisions are directed at potential abuses by a tyrannical government and those provisions should not, in my opinion, be so diluted in order to secure convictions in narcotics and gambling cases that they can no longer afford protection against the operations of a Hitler type government. It may be that the constitutional protection is phrased in terms that are considered too sweeping to meet the needs of society today. If so, they should be amended. But it is the responsibility of a court to interpret and apply the constitutional provisions as they exist.

The constitutional question involved in these cases was deliberately left open by the Supreme Court of the United States in *Rugendorf* v. *United States* (1964), 376 U.S. 528, 11 L. Ed. 2d 887, 84 S. Ct. 825. The consideration that weighs most heavily in support of the conclusion reached by the majority in these cases is the desire to expedite the disposition of criminal cases. But it is a common characteristic of many constitutional guarantees that they impede the prompt disposition of criminal cases. Indeed, the constitutional privilege against self-incrimination goes further, and interferes with the ascertainment

of the truth. The judicial system is resourceful enough to devise procedures which will prevent abuse of the right to challenge the existence of the facts that were relied upon by the issuing officer to establish probable cause. See *People* v. *Alfinito* (1965), 16 N.Y.2d 181, 211 N.E.2d 181, 211 N.E.2d 644; see also A.L.I. Model Code of Pre-Arraignment Procedure, Tent. Draft No. 3, sec. SS 802, and Reporters' Note.

Apart from constitutional considerations, it seems to me that section 114—12 of the Code of Criminal Procedure (Ill. Rev. Stat. 1969, ch. 38, par. 114—12) clearly provides for a hearing at which the existence of the facts that were relied upon by the issuing officer to establish probable cause may be challenged. The statute states:

> "(a) A defendant aggrieved by an unlawful search and seizure may move the court for the return of property and to suppress as evidence anything so obtained on the ground that: * * * (2) The search and seizure with a warrant was illegal because the warrant is insufficient on its face; the evidence seized is not that described in the warrant; *there was not probable cause for the issuance of the warrant*; or, the warrant was illegally executed.
>
> (b) The motion shall be in writing and state facts showing wherein the search and seizure was unlawful. *The judge shall receive evidence on any issue of fact necessary to determine the motion* and the burden of proving that the search and seizure were unlawful shall be on the defendant." (Emphasis supplied.)

This statute plainly says that evidence is to be received on the question whether there was probable cause for the issuance of the warrant. Since probable cause initially depended on the facts stated in the affidavit upon which the warrant was issued, the statute must mean that upon a motion to suppress, evidence disputing those facts is to be received.

But even if the statute can somehow be construed to mean that evidence may not be received to show the absence of probable cause, I am of the opinion that the guilt of the defendant, Barbara Mitchell, was not established beyond a reasonable doubt. This case was tried upon a stipulation that guilt or innocence should be determined upon the evidence submitted on the motion to suppress. In my opinion that evidence bars a finding of guilty.

Thirty affidavits that had been used to procure warrants in previous cases were presented to the court. These affidavits were all similar to those used in this case. The officers upon whose affidavits the warrants in the present cases were issued testified that they had prepared a hundred similar affidavits, but that in none of those cases did the informant identify the recipient of the bet. The officers who made the affidavits testified that they did not in any of these cases inquire of the informer where he paid his losses or collected his winnings. This testimony shows a massive indifference on the part of the officers to their duty to suppress gambling; it seems to suggest a conscious effort to avoid implicating any higher-ups in organized gambling. It is not necessary that we attempt to arrive at a precise rationalization of these inherently incredible circumstances; their existence, in connection with the wholesale use of "boilerplate" affidavits is enough, in my opinion, to show an absence of probable cause. The doubts generated by the extraordinary testimony of the officers are reinforced by the fact that while records of other bets were found when the warrant was executed, there was no record of the bet supposed to have been made by the informer. The defendant, Barbara Mitchell, testified that she had never accepted a bet on a horse race. In my opinion her guilt was not proved beyond a reasonable doubt.

APPENDIX "C"

Docket Nos. 41151, 41315 cons.—Agenda 67—November, 1969.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, *vs.* JOHN S. BAK, Appellant.—THE PEOPLE *ex rel.* JOHN J. STAMOS, Appellee, *vs.* 1964 CADILLAC, Appellant.

MR. JUSTICE WARD delivered the opinion of the court:

The defendant, John S. Bak, was convicted in the circuit court of Cook County of the crime of gambling and fined $250. His automobile was declared forfeited in a companion case and ordered sold because it had been used by him in the commission of the gambling offense. The cases have been consolidated for appeal. The question presented is whether the person against whom or against whose property a search warrant has been directed may dispute the matters declared under oath which led to the finding of probable cause and the issuance of a search warrant by the judicial officer.

The complaint was filed by a police officer seeking a warrant to search the person of the defendant and his auto, which was specifically described. The auto was described as registered in the name of the defendant at the address of a tavern called The Pub. The objects to be sought under the warrant were particularly described. The affidavit given by the officer further recited that a reliable informant had given him information that horse-race gambling was taking place at the Pub; that the informant had given reliable information on two previous occasions; that the informant had placed bets at the Pub in a rear room screened from the tavern area by a wall of beer cases. The affiant further declared that on two occasions he had personally observed a number of persons walk behind the wall of beer cases and leave from the rear door; that on another occasion he had observed a person reading a racing form in the tavern and after

making notes the person walked to the rear and then out of the rear door; that he had seen the informant do likewise and that the informant later told the affiant that he had placed a bet in the rear of the tavern. The affidavit recited also that the informant declared that the defendant was the person who picked up bets from the tavern and that the auto described was used for this purpose.

On a motion to suppress and again at trial the defendant requested a hearing for the purpose of proving that the informer was not reliable and that other allegations made by the affiant were not true. He offered to prove that on the two instances cited in the affidavit in support of the reliability of the informer arrests resulted but no convictions; that the affidavit had misrepresented the physical appearance of the tavern, which misrepresentations could be proved by photographs and witnesses; that there was no rear room to the tavern but there was another entrance to the tavern from another street, which entrance was not visible from the part of the bar from which the affiant had made his observations; that the informer never had any contact with the defendant or his car; and, finally, that the only paragraph mentioning the defendant was the last one in the complaint, which obviously had been typed on a different typewriter, and which may have been added after the execution of the search warrant.

The trial court held that the defendant did not have a right to a hearing because the warrant was sufficient on its face and that the defendant was not entitled to inquire behind the warrant and affidavit. The defendant did not testify at the trial and the State proved that after the warrant had been served the defendant had been arrested in his car and that gambling paraphernalia had been found on his person and in the auto. Later, in the forfeiture trial, another motion to suppress was denied, although some of the evidence offered there by the defendant was heard by the court.

The defendant contends that he has a constitutional right to look behind a search warrant which is valid on

its face and to present evidence challenging the truthfulness of the allegations of fact on which the warrant was issued. The State contends that the issuance of a warrant represents a conclusive judicial finding of the existence of probable cause and that any subsequent hearing which may be ordered must be limited to an examination of the face of the complaint and warrant.

It would appear that a majority of the jurisdictions which have considered the question have concluded that matters alleged under oath, upon which a search warrant was issued, may not be disputed by the one against whom or against whose property the warrant has been directed. See, *Kenney* v. *United States*, (D.C. cir.), 157 F.2d 442; *United States* v. *Giannis*, (D.C.), 25 F.R.D. 194; *Tucker* v. *State*, 244 Md. 488, 224 A.2d 111; *Mattingly* v. *Commonwealth*, 310 Ky. 561, 221 S.W.2d 82; *Owens* v. *State*, 217 Tenn. 544, 399 S.W.2d 507; *Hernandez* v. *State*, 158 Tex. Crim. 296, 255 S.W.2d 219; *Griffey* v. *State*, 168 Tex. Crim. 338, 327 S.W.2d 585; Annot. 5 A.L.R.2d 394.

However, other courts either by holding or by suggestion have favored a contrary view. See, *United States* v. *Suarez* (2d cir.), 380 F.2d 713; *United States* v. *Gillette* (2d cir.), 383 F.2d 843; *United States* v. *Roth* (7th cir.), 391 F.2d 507; *People* v. *Alfinito*, 16 N.Y.2d 181, 211 N.E. 2d 644.

The Supreme Court has not yet ruled on the question. In *Rugendorf* v. *United States*, 376 U.S. 528, 11 L. Ed. 2d 887, 84 S. Ct. 825, the Court said (376 U.S. at 532, 11 L. Ed. 2d at 891.): "Petitioner attacks the validity of the search warrant. This court has never passed directly on the extent to which a court may permit such examination when the search warrant is valid on its face and when the allegations of the underlying affidavit establish 'probable cause' * * *." This court has not directly considered the issue, but the appellee urges that we follow the majority view, which, it says, was impliedly approved in *People* v. *Alvis*, 342 Ill. 460, 462, and in *People* v. *Elmore*, 16 Ill. 2d 412, 414. In *Alvis* this court, after ruling that

probable cause to issue a search warrant appeared from the faces of the affidavit and warrant, said: "It is also contended that the court should have heard evidence to determine the legality of the search warrant. The motion to suppress evidence was based on the illegality of the search warrant. Its legality could be determined by the examination of the affidavit and warrant, and no necessity for the hearing of evidence arose."

Persuasive arguments can be gathered to support either side of the question. The majority of the members of this court prefer the view that the matters declared which caused the search warrant to be issued may not be contested by one subjected to the search.

The fourth amendment to the constitution of the United States and section 6 of article II of the Illinois constitution are practically identical in prohibiting unreasonable searches and seizures and providing that no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized. Too, the standards for issuance of warrants are the same for both Federal and State authorities. *Aguilar* v. *Texas*, 378 U.S. 108, 12 L. Ed. 2d 723, 84 S. Ct. 1509.

This majority of the court believes that both constitutions contemplate only that a judicial officer find probable cause for the issuance of a warrant based on the evidence under oath that has been presented to him by the one requesting the warrant. It is contemplated that the credibility of the affiant or others offering evidence is for the judicial officer. If he finds the evidence worthy of belief, and sufficient to form probable cause, this judicial determination cannot be relitigated through a later disputing of the evidence. Should an affiant betray the confidence in his integrity which is contemplated by the *ex parte* proceeding and intentionally make misrepresentations to the judicial officer, he can be punished for the offense. In *People* v. *McGrain*, 38 Ill.2d 189, 190-191, it was correctly asserted that "the rule [is] that the constitutional guaran-

tee against unreasonable searches and seizures requires that the complaint must state the underlying facts on which the complaint bases his belief with such definiteness that, if the complaint is false, perjury may be assigned upon it." That this and no more are contemplated by the procedure for finding probable cause and issuing search warrants is supported by the expression of the Supreme Court of New Jersey (*State* v. *Burnett*, 42 N.J. 377, 201 A.2d 39) which the Supreme Court in *McCray* v. *Illinois*, 386 U.S. 300, adopted at p. 307: "The Fourth Amendment is served if a judicial mind passes upon the existence of probable cause. Where the issue is submitted upon an application for a warrant, the magistrate is trusted to evaluate the credibility of the affiant in an ex parte proceeding. As we have said, the magistrate is concerned, not with whether the informant lied, but with whether the affiant is truthful in his recitation of what he was told. If the magistrate doubts the credibility of the affiant, he may require that the informant be identified or even produced." 386 U.S. 300, 307, 18 L. Ed. 2d 62, 68, 87 S. Ct. 1056.

The view that probable cause for the issuance of a search warrant is to be tested by the evidence originally presented to the judicial officer and that alone is consistent with holdings that the prosecution is precluded from offering supplemental information to sustain a showing of probable cause. The Supreme Court in *Aguilar* v. *Texas*, 378 U.S. 108, 109, 12 L. Ed. 2d 723, 725, n.1, said: "It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention."

The Supreme Court in *McCray* v. *Illinois*, 386 U.S. 300, recognized the value of informers to law enforcement and assured that their identities under described circumstances need not be disclosed. Were this court to adopt a rule permitting a challenge to the evidence presented to the judicial officer to establish probable cause, it could impair seriously the present protection afforded informers in this area. Cases in which probable cause is established

through information provided the affiant officer by an informer are obviously numerous. One can readily suppose contrived situations in which a defendant in these cases, by offering, in a motion to suppress, to contradict or explain what the informer told the police officer, would frame an issue of fact, which could require a hearing and the production of the informer to testify. The alternative would be for the People to drop the prosecutive proceeding. Too, these supposed situations would not be limited to search warrants based on information provided by informers. Where an affiant was deceased, or otherwise unavailable to answer, if required, a challenge to the sworn to matters he originally presented to the judicial officer, a similar problem could appear.

Too, the view permitting a challenge to the matters on which probable cause was found would often, if not typically, result in one judicial officer originally evaluating the credibility of the affiant and another reassessing it in the later motion to suppress. To illustrate, Rule 41(e) of the Federal Rules of Criminal Procedure requires that motions to suppress be brought before a district court, though many, if not most, search warrants are issued by a United States Commissioner. Thus, the district court could be reassessing the matter of credibility already considered by the Commissioner. The majority of this court consider that successive or split evaluations by different judicial officers of the credibility of the affiant and others originally offering evidence were not contemplated in the search warrant procurement procedure.

We do not find merit in the suggestion that there is statutory authority to dispute the matters on which probable cause was found. Section 114—12 of the Code of Criminal Procedure (Ill. Rev. Stat. 1967, ch. 38, par. 114—12) provides in part that a ground for the suppression of evidence is that "there was not probable cause for the issuance of the warrant" and that "The judge shall receive evidence on any issue of fact necessary to determine the motion." If it was the legislative intent to declare the right for which the defendant here contends it

certainly has eluded the understanding of the profession in Illinois. No court to our knowledge has so interpreted the statute. The committee comments to the section do not mention such a right and the law reviews and bar journals appear to be in ignorance of it. A comparison with statutes which grant the right make it evident that our legislature would have used clearly appropriate language to declare the right had this been its intention. For example, the California statute, quoted in *People* v. *Butler*, 52 Cal. Rptr. 4, 415 P.2d 819, reads: "If the grounds on which the warrant was issued be controverted, he [the magistrate] must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and authenticated in the manner prescribed in Section 869." The predecessor (former 18 U.S.C.A. 625) to Rule 41 of the Federal Rules of Criminal Procedure in similar language provided: "If the grounds on which the warrant was issued be controverted, the judge or commissioner must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and subscribed by each witness." Had our legislature intended to declare the right, we consider it would have done so forthrightly, using comparable language. It would not have attempted to do it through oblique suggestion.

Our statute's language is very similar to that of Rule 41(e) of the Federal Rules of Criminal Procedure, and no clear right appears under Rule 41 to dispute the evidence upon which probable cause was based. *Cf Rugendorf* v. *United States*, 376 U.S. 528, 11 L. Ed. 2d 887, 84 S. Ct. 825; 5 A.L.R. 2d 394, 409.

Thus, our majority declines to adopt a rule which it believes would unnecessarily permit a collateral and distracting evidentiary dispute. Justices Schaefer and Ward consider that the integrity of the judicial process requires that a challenge to evidence be allowed.

The judgments of the circuit court of Cook County are affirmed.

Judgments affirmed.

APPENDIX "D"

No. 53135 People of the State of Illinois, *Plaintiff-Appellant,* v. John Healy and Edward Healy, *Defendants-Appellees.*	Appeal from the Circuit Court of Cook County. Hon. L. Sheldon Brown, Presiding.

Mr. Justice McNamara Delivered The Opinion Of The Court.

This is an appeal by the State from an order of the Circuit Court quashing a search warrant and suppressing evidence seized pursuant to that warrant. The warrant issued by a magistrate commanded the search of the persons of the two defendants and of certain described premises located at 8247 North Odell Avenue, Niles Illinois. The warrant also ordered the seizure of three jewelry cases containing specifically described jewelry.

The search warrant was issued on the basis of an affidavit made by a police officer. The affidavit recited that on the same date the affiant met with a confidential reliable informant who had furnished him with information in the past which had resulted in arrest and convictions. The affidavit went on to recite that the informant had told affiant that he was on the above described premises on the same date and that Edward Healy had shown him the jewelry referred to above. The affidavit further recited that Healy had told the informant that the jewelry was stolen from a jewelry salesman on the preceding day; and that the jewelry in question had been offered for sale to informant who said that he would let Healy know at a later time. The affidavit also recited that the police department was advised that a theft of jewelry had occurred in Lincoln, Illinois on the preceding day and that jewelry in the value of $23,000 had been stolen from Ray Cruze.

The warrant was executed on the following day, and various items of jewelry belonging to Cruze were recovered. Defendants were then indicted for theft of the property of Cruze. Thereafter defendants filed a motion to quash the search warrant and to suppress the evidence, alleging among other points that there was in fact no informant and that the police officer had committed perjury in making the affidavit in support of the search warrant. The motion made by defendants also requested that the informant be produced for an in camera hearing outside the presence of defendants.

After conferences in chambers with defense counsel and the Assistant State's Attorney, the trial judge stated that he was convinced that there was no informant, and he demanded that the informant and the police officer be produced for an in camera hearing. When the State refused to do so, the trial court entered an order quashing the search warrant and suppressing the evidence. The State appeals, contending that defendants had no right to look behind the search warrant and thus challenge the matters stated under oath which led to the finding of probable cause and the issuance of a search warrant by the magistrate.

In a recent decision, *People* v. *Bak*, ... Ill.2d ....., Gen. Nos. 41151, 51315 (1970), our Supreme Court was faced with precisely the same question, and their holding is dispositive of the issue in the instant case. In that case, the court held that the issuance of a search warrant represented a conclusive judicial finding of the existence of probable cause and that any subsequent hearing must be limited to an examination of the face of the complaint and warrant. In so holding, the court stated:

> "The majority of this Court believes that both constitutions contemplate only that a judicial officer find probable cause for the issuance of a warrant based on the evidence under oath that has been presented to him by the one requesting the warrant. It is con-

templated that the credibility of the affiant or others offering evidence is for the judicial officer. If he finds the evidence worthy of belief and sufficient to form probable cause, this judicial determination cannot be relitigated through a later disputing of the evidence."

Thus under the holding in *Bak*, we find that the trial court erred in permitting defendants to look behind the search warrant which was valid on its face and in allowing them to challenge the truthfulness of the allegations of fact on which the warrant was issued.

The order of the Circuit Court quashing the search warrant and suppressing the evidence is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

ORDER REVERSED AND
CAUSE REMANDED.

DEMPSEY, *P.J.*, and SCHWARTZ, *J.*, concur.